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Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 330 (874).

ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, &c., *et al.*,
Appellants,

vs.

JOAB H. BANTON, District Attorney of the County of New York, and MANFRED W. EHRICH, Trustee in Bankruptcy,
Appellees.

BRIEF FOR APPELLEE, JOAB H. BANTON, AS DISTRICT ATTORNEY, ETC.

Statement.

This is an appeal from an order entered in the District Court of the United States for the Southern District of New York on April 12th, 1922, discharging a rule to show cause and denying the prayer of a petition for injunctive and other relief.

On January 16th, 1922, an order was entered in the District Court of the United States for the Southern District of New York, appointing the appellee herein, Manfred W. Ehrich, Receiver "In the Matter of Elmore D. Dier, Harry J. Lawrence, Jr., and Lawrence Starr, individually and as copartners doing business under the firm name of E. D. Dier & Co., and E. D. Dier & Co., alleged bankrupts." The proceeding in which such appointment was made was instituted by three creditors. The said order directed the said alleged bankrupts, their attorneys, agents, officers and servants to deliver forthwith to the said receiver all his property and effects in the possession of or owned by the said alleged bankrupts, including account books, records, etc. (Tr., pp. 1-2).

On February 16th, 1922, the said Elmore D. Dier obtained an order from the District Court of the United States for the Southern District of New York, requiring Joab H. Banton, District Attorney for New York County, and Manfred W. Ehrich, as the receiver of the goods, chattels, property and effects of Elmore D. Dier & Co., to show cause before the said court why an order should not be made enjoining and restraining the said receiver from turning over to the said District Attorney the books, records, documents and papers of Elmore D. Dier and E. D. Dier & Co. upon the ground that the delivery of such papers to the said District Attorney would be "violative of the constitutional protection accorded said alleged bankrupts". This order to show cause was based upon a petition verified by Elmore D. Dier on February 16th, 1922, which alleged, among other things, that the petitioner had been informed by the receiver that the District Attorney of New York County had requested the receiver to deliver possession of the books, records and

papers of the petitioner and of the firm of E. D. Dier & Co., to the end that the same might be used by the District Attorney before the Grand Jury of the County of New York in criminal proceedings wherein the District Attorney sought the indictment of the petitioner. The petition also alleged that the delivery of the said books, records and papers to the District Attorney by the receiver would be in plain violation of the protection accorded to the petitioner and to the firm of E. D. Dier & Co. by the Fourth and Fifth Amendments to the Constitution of the United States (Tr., pp. 4-7).

The petition and order to show cause were heard on the return day by Hon. Learned Hand, District Judge, who on February 27th, 1922, rendered a written opinion that the rule be discharged on the ground that the petitioner was not entitled to the relief sought in the petition (Tr., pp. 5, 6).

On April 12th, 1922, an order was entered in the District Court of the United States for the Southern District of New York, discharging the rule and denying the injunctive and other relief prayed for in the petition, and directing the receiver and the alleged bankrupts to "deliver over said books, records and documents of said E. D. Dier and E. D. Dier & Co. to the District Attorney of the County of New York for use in said criminal proceedings against said petitioners if and when appropriate process for that purpose is duly served" (Tr., pp. 8, 9).

On April 12th, 1922, orders were entered in the District Court of the United States for the Southern District of New York substituting Manfred W. Ehrich, as trustee of the alleged bankrupts, as a party herein in the place of Manfred W. Ehrich, receiver of the alleged bankrupts, and allowing an appeal to this court from the order discharging

the rule and denying the injunctive relief sought in the petition (Tr., pp. 8, 13).

Thereafter, and in the month of May, 1922, this court denied the appellants' motion to advance the cause for argument and for a stay against the receiver and the District Attorney pending the argument.

There is nothing in the petition for an injunction to show that the alleged bankrupts, when they surrendered the possession of the books to the receiver, made any objection to the surrender or made any attempt to preserve any constitutional rights which they may have had against the use of the books in criminal prosecutions instituted against them.

The Assignments of Error.

The appellants have made eight assignments of error (Tr., pp. 10, 11). These assignments raise but one question for determination by this court. That question is as follows:

> Where alleged bankrupts surrender their books, records and documents to the receiver appointed in involuntary bankruptcy proceedings instituted against them, and do this without objection or protest and without making any claim of right or privilege to be protected against the subsequent use of such books, etc., in criminal prosecutions instituted against them, does the delivery of such books, etc., to a state prosecuting officer for use in criminal proceedings against the said alleged bankrupts violate their constitutional privileges under the Fourth and Fifth Amendments to the Constitution of the United States?

POINT I.

If the appellants had any right or privilege against the use of the books, etc., as evidence against them in any criminal prosecution, they waived it by failing to assert it seasonably.

The petition for an injunction filed in the District Court does not allege that the alleged bankrupts interposed any objection or made any assertion of privilege against use in criminal prosecution at or before the time when their books, records and papers were surrendered to the receiver appointed in the bankruptcy proceedings instituted against them, or at any time prior to the making of the petition. This being so, it must be assumed, for the purpose of this appeal, that no such objection or assertion of privilege was made prior to the making of the petition in this proceeding, which was 31 days after the appointment of the receiver in bankruptcy.

We do not concede that if the alleged bankrupts had, at the time of the surrender of the books, records and papers to the receiver in bankruptcy, stipulated that they should not be used as evidence against them in a criminal prosecuion, such sipulation would have availed to prevent the authorities of the State of New York from using the evidence in a criminal prosecution against the bankrupts in the said courts. Indeed, that very question is involved in two appeals which the District Attorney of New York County has taken to this Court from orders enjoining him from compelling the production of the books of certain bankrupts. The appeals in question will come on for argument some time in the near future.

But if we concede, for the sake of the argument in this case, that bankrupts have a constitutional right or privilege against production of their papers after surrender to the receiver, where due and seasonable assertion of the right is made, we respectfully submit that the right, if it exists, is one that may be waived.

In the case at bar, any constitutional right or privilege which the bankrupts may have had in regard to the use of the books, records and papers as evidence against them in a criminal prosecution in the courts of the State of New York was waived by the failure of the bankrupts to assert such right or privilege at the time they parted with the possession of the books, etc.—that is, at the time that possession was surrendered to the receiver in bankruptcy. This is made so clear by the opinion of Judge Hand in the District Court in this case, that we set out his opinion in full and adopt his reasoning and his statement of the law for our argument:

> "It may be accepted that Judge Holt's ruling in *re* Harris, 164 Fed. Rep. 293, had the approval of the Supreme Court in the appeal in that case, in *re* Harris, 221 U. S. 274. There the alleged bankrupt resisted the surrender of his books to the receiver and was eventually protected to the extent that though he must surrender, it was on condition that the books should not be used by the receiver in aid of any criminal prosecution against him. Thus a compromise was effected between the right of his creditors to administer his assets and his own right not to produce evidence against himself.
>
> In Johnson *v.* U. S. 228 U. S. 457, the bankrupt had without reservation surrendered his books to a trustee and these were thereafter used against him in a criminal trial over his objection. The point involving his consti-

tutional privilege went to the Supreme Court and was ruled against him. The theory of the case was that once possession and title passed without protest from the bankrupt his privilege ended.

'A party is privileged from producing the evidence, but not from its production' (p. 458). In the case at bar there is indeed no trustee, only a receiver, and a receiver has no title, but that I conceive makes no difference. The production depends as little upon compelling the incriminated person to produce evidence against himself, when the possessor has no title as when he has. The possessor alone can produce, not the owner, and the privilege protects only against such compulsion. See also in *re* Tracy, 177 Fed. Rep. 532, and in *re* Mandel, 224 Fed. Rep. 642. The test I take is whether the surrender was resisted when the receiver demanded possession.

Cases like Boyd *v.* U. S., 116 U. S. 616, Weeks *v.* U. S. 232 U. S. 383, and Silverthorne Lumber Co. *v.* U. S. 251 385, are not in point. In each the possessor of the evidence was forced to produce by illegal means, and this was held to taint, as it were, the evidence, so that not even information might be used, which was derived during the unlawful possession. Gouled *v.* U. S. 255 U. S. 298 extended the rule to evidence procured by fraud. None of them touches the competency of proof which has been surrendered without claim of privilege made at the time when the privilege could have been effectively asserted.

Nor is Arndstein *v.* McCarthy, 254 U. S. 71, nearer. That case decided that the declarations contained in schedules did not open the door to examination generally of the bankrupt's assets. It would apply only in case the alleged bankrupts here were examined upon the transactions contained in the books and papers. No one suggested that the schedules themselves were privileged in favor of the bankrupts. Had that been the ruling, as for example, it was before the repeal